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MEMORANDUM OF LAW

DATE: February 10, 1997

NAME: Ed Ryan, City Auditor and Comptroller

FROM: City Attorney

SUBJECT: Authority to Issue Checks Following Closed Session Approval, but Before Open Session Notice, Where Auditor's Certificate was Available in Closed Session

QUESTION PRESENTED

May the City Auditor and Comptroller ("Auditor") issue a check in settlement of litigation following the closed session in which the settlement was approved, and for which the Auditor's Certificate ("AC") was available, but before the settlement is noticed on the open session docket?

SHORT ANSWER

The Auditor may issue a check under the circumstances described without violating either the Brown Act (Cal. Govt. Code §§ 54950 - 54962), or City Charter sections 39, 80, 82 or 83. The availability of the AC in closed session satisfies the requirements of the Charter for the issuance of the check. The Brown Act allows a final action to be taken in Closed Session, although a public notice item may be placed on a later open session docket.

BACKGROUND

Oftentimes, the City Council will approve a settlement of litigation in closed session. If an AC was not available at the time of the closed session, the practice has been to place the matter on a later open session docket following the issuance of an AC and recording the official vote at the open session. Sometimes, the AC is available at the closed session. In that case, the practice has been to place the approved settlement on an open session docket at a later time as a "public

notice" item only, which does not require a vote but is merely for the purpose of meeting the notice requirements of state law.

On certain occasions where the latter practice is followed, the Auditor may be asked to issue a check subsequent to the closed session but prior to the open session "public notice." The Auditor has asked if he may lawfully issue such a check in those instances.

DISCUSSION

The question presented is answered by reference to City Charter sections 39, 80, 82 and 83, concerning the authority of the Auditor, and to the Brown Act provisions governing the taking of actions in closed session. While the Charter and Brown Act provisions may intersect in their operation, they are not mutually dependant on each other. As more fully explained below, the Charter requirements address the need for a certification that money is available for an action to be taken, whereas the Brown Act provides authority for taking an action in closed session and for appropriate notice of that action.

I. City Charter Requirements.

The authority of the Auditor concerning these matters is set forth in Charter sections 39, 80, 82 and 83. In relevant part, they provide:

Section 39

[N]o . . . contract shall be valid unless the Auditor and Comptroller shall certify in writing that there has been made an appropriation to cover the expenditure and that there remains a sufficient balance to meet the demand thereof.

Section 80

No contract, agreement, or other obligation, involving the expenditure of money out of appropriations made by the Council in any one fiscal year shall be entered into, nor shall any order for such expenditure be valid unless the Auditor and Comptroller shall first certify to the Council that the money required for such contract, agreement or obligation for such year is in the treasury to the credit of the appropriation from which it is to be drawn and that it is otherwise unencumbered.

Section 82

The Auditor shall . . . issue no warrant or check-warrant for payment unless he finds that the claim is in proper form, correctly computed, and duly approved; that it is legally due and payable; that an appropriation has been made therefor which has not been exhausted; and that there is money in the treasury to make payment.

Section 83

The Auditor and Comptroller shall issue no warrant or check-warrant for the payment of a claim unless the claim be evidenced by voucher approved by the head of the Department of office for which the indebtedness was incurred,

These provisions generally require that before any check may be issued, or settlement agreement (involving the payment of monies) approved, the Auditor must have first certified that funds are available pursuant to an appropriation, and that the appropriate documentation is provided for the claim (direct payment request). What is thus important for Charter purposes is whether the AC was available at the time of the vote by the City Council, whether in closed or open session. If an action may be taken in closed session, a check may be issued by the Auditor if the AC was available at the time of the closed session vote, provided all other Charter requirements are met. The notice requirements of the Brown Act, as discussed below, do not prohibit the Auditor from issuing such a check.

II. Brown Act.

The Brown Act generally governs when a legislative body may take an action, and what notice must be provided either before or after the action is taken. In relevant part here, the Brown Act provides that the City Council may take certain actions in closed session, provided appropriate notice is given both before and after the closed session. Cal. Govt. Code §§ 54952.6, 54954.2(a), 54954.5(c) and 54956.9. Once a final action is taken, for example the approval of a settlement, a "public report" of the action must be made, but the public report requirement does not affect the validity of the action taken in closed session. Cal. Govt. Code §§ 54957.1(a)(3) and (b).

In the example cited, if proper notice is given prior to the closed session, the City Council may approve the settlement of a case. The Brown Act merely requires that the item be publicly noticed immediately or notice provided upon request, depending on the circumstances.¹ Cal. Govt. Code § 54957.1(a). A final action has still been taken, however, and no further action by

¹The City's practice of placing matters on the docket as "public notice" items is designed to satisfy this requirement.

the Council is required by the Brown Act.² A check may thus be issued provided all other Charter procedures are followed.³

CONCLUSION

Provided all other requirements of the City Charter are met, the Auditor may issue a check in settlement of litigation following a closed session for which an AC was available, but prior to any subsequent open session on which the matter will appear as a public notice item.

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By

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²By contrast, if the AC was not available at the Closed Session, the Charter, not the Brown Act, requires an open session item on a future docket so that the AC is available prior to the Council's vote. In those circumstances, however, the Closed Session vote is still recorded as the official vote.

³While the check may be issued, its transmittal is governed by different authorization, usually to the City Manager. Such authority is governed by the conditions of the grant, for example if certain documents are required to be executed before the check may be transmitted. Those matters are not relevant to the authority of the Auditor to issue the check, as analyzed in this memorandum.